

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DEFORGE MARITIME TOWING,
11 LLC, et al.,

CASE NO. C20-1085JLR

ORDER

12 Plaintiffs,

v.

13 ALASKA LOGISTICS, LLC, et al.,

14 Defendants.

15 I. INTRODUCTION

16 Before the court are: (1) Defendant Alaska Logistics, LLC (“AL”) and Allyn G.
17 Long’s (collectively, “Defendants”) motion for partial summary judgment (Defs. MSJ
18 (Dkt. # 27); Defs. Reply (Dkt. # 38)); and (2) Plaintiffs DeForge Maritime Towing, LLC
19 (“DMT”) and Double EMC Marine, LLC’s (“Double EMC”)¹ motion for partial
20

21

¹ Although DMT and Double EMC jointly filed a motion for partial summary judgment,
22 Double EMC was dismissed from this case shortly after the parties filed their motions. (*See*
generally Pls. MSJ; Dkt.; 2/12/22 Order (Dkt. # 33); Stip. (Dkt. # 32).) Because Double EMC is

1 summary judgment (Pls. MSJ (Dkt. # 30); Pls. Reply (Dkt. # 39)). Each party opposes
 2 the other's motion. (Defs. Resp (Dkt. # 34); Pls. Resp. (Dkt. # 35).) The court has
 3 considered the motions, the parties' submissions in support of and in opposition to the
 4 motions, the relevant portions of the record, and the applicable law. Being fully advised,²
 5 the court DENIES DMT's motion for partial summary judgment and GRANTS in part
 6 and DENIES in part Defendants' motion for partial summary judgment.

7 II. BACKGROUND

8 This admiralty action arises out of a contract dispute between DMT and AL
 9 regarding the parties' 2018 and 2019 "Time Charter Agreements" (collectively, the
 10 "Time Charter Agreements" or the "Agreements"). (*See generally* Am. Compl. (Dkt.
 11 # 17); DeForge Decl. (Dkt. # 31) ¶ 5, Ex. 1 ("2018 Time Charter Agreement"); *id.* ¶ 8,
 12 Ex. 4 ("2019 Time Charter Agreement").³) DMT is a tug and barge company that
 13 provides services in the western United States, including carriage, transportation,
 14 chartering, and vessel transport. (*See* DeForge Decl. ¶ 2.) AL is a marine transportation
 15 company that provides services in Western Alaska and the Arctic. (*See* Park Decl. (Dkt.
 16 # 29) ¶ 2, Ex. A ("Long Dep.") at 9:10-18.)

17 //

18 _____
 19 no longer a party to this case, the court refers to the pleadings submitted by both Double EMC
 and DMT, as well as the claims contained in the amended complaint, as DMT's alone.

20 ² Neither party has requested oral argument (*see* Defs. MSJ at 1; Pls. MSJ at 1), and the
 21 court has determined that oral argument would not be helpful to its disposition of the motions,
see Local Rules W.D. Wash. LCR 7(b)(4).

22 ³ Unless otherwise indicated, the court uses the CM/ECF page numbers when citing to
 the parties' pleadings and exhibits.

1 **A. The 2018 Time Charter Agreement**

2 In 2018, DMT and AL began discussing the possibility of AL chartering tugs and
 3 barges from DMT for use in AL’s Alaska transport operations. (*See* DeForge Decl. ¶ 3.)
 4 AL and DMT ultimately entered into a time charter agreement (the “2018 Time Charter
 5 Agreement”) for the charter of the barge THELMA 302 (the “THELMA”)⁴ and two
 6 DMT tugs (collectively, the “vessels”) on May 9, 2018. (*See* 2018 Time Charter
 7 Agreement; DeForge Decl. ¶ 5; *see also* Long Dep. at 11:10-17 (stating that the
 8 THELMA was larger than the barges owned by AL and thus more useful for longer
 9 journeys).)

10 The 2018 Time Charter Agreement described the vessels to be chartered, the
 11 on-hire and off-hire dates for the vessels, and the price terms. (*See, e.g.*, 2018 Time
 12 Charter Agreement ¶ 1.1.) In addition, the agreement provided that, “subject to [AL]’s
 13 general direction, [DMT] shall have exclusive control and command of the Vessels’
 14 operation and navigation,” while AL would be in control of loading and unloading cargo
 15 and similar operations. (*See id.* ¶¶ 1.1, 2.8.) The parties also agreed that the agreement
 16 would be governed “first by the General Maritime Law of the United States and second
 17 by the laws of the State of Washington, insofar as applicable.” (*See id.* ¶ 12.4.)

18 Under the terms of the 2018 Time Charter Agreement, AL, with the permission of
 19 DMT, was permitted to install additional equipment on and make alterations to the

20
 21 ⁴ Double EMC, a Washington barge company, is the registered owner of the THELMA.
 22 (*See* Park Decl. ¶ 3, Ex. B (“Edwards Dep.”) at 14:4-9, 20:24-25:1.) During the times relevant to
 this case, DMT “[b]areboat chartered” the THELMA from Double EMC for the purposes of
 using and chartering the barge for its business. (*See id.* at 24:7-18.)

1 chartered vessels. (*Id.* ¶ 3.1.) The agreement provided, however, that “[t]he On-Hire
 2 Period for each Vessel shall not end until [AL], at its sole cost and expense, removes all
 3 such equipment, materials and gear, and restores each Vessel to its condition prior to
 4 making such changes, ordinary wear and tear excepted.” (*Id.*) The agreement also
 5 addressed redelivery of the vessels and defined the end of the charter period, stating that
 6 “[t]he Vessels shall be redelivered to [DMT] upon termination of the On-Hire Periods
 7 applicable thereto at [DMT’s] home port in Seattle, Washington, or other such other
 8 location as agreed between the parties, in the same order and condition, ordinary wear
 9 and tear excepted, as when accepted by [AL].” (*Id.* art. 5.)

10 The 2018 Time Charter Agreement also imposed specific duties and liabilities on
 11 AL regarding its handling of the chartered vessels. For example, DMT and AL agreed to
 12 the following:

13 2.7 [AL] shall not at any time ground the THELMA. Any damage to the
 14 THELMA caused by grounding while in the sole control of [AL] will be at
 15 the sole expense of and for the sole account of [AL].

16

17 2.9 [AL] will ensure that there is adequate fendering at all moorage facilities.
 18 Any damage resulting to any of the Vessels arising from [AL’s] failure to do
 19 so will be for the sole account of [AL].

20 (*Id.* ¶¶ 2.7, 2.9.) The parties also executed an addendum to the 2018 Time Charter
 21 Agreement, which transferred liability for damage to the THELMA as a result of the
 22 condition of the berth or loading or unloading cargo to AL:

23 1. [AL] shall direct the Vessels to and between safe ports. [AL] shall be
 24 responsible for any loss or damage sustained by any of the Vessels by reason
 25 of the condition of berth or offshore unit.

1 2. Notwithstanding the provisions of Article 8, [AL] shall be responsible for
 2 loss or damage to any Vessel caused by the loading or unloading of any
 3 cargo.

4 (Id. at Addendum ¶¶ 1-2.⁵)

5 The parties also agreed to a system for determining the condition of the chartered
 6 vessels at the time of “on-hire” and “off-hire.” (Id. ¶ 4.1.) The agreement called for an
 7 agreed-upon qualified surveyor to conduct an on-hire survey prior to the charter period,
 8 as well as an off-hire survey, which is “an equivalent survey by the same surveyor,” at
 9 the termination of the charter hire. (Id.) The agreement further provided that the on-hire
 10 survey “shall be conclusive evidence of the condition of the Vessel as of the date of
 11 commencement of the period of hire” and the off-hire survey “shall likewise be
 12 conclusive evidence of the condition of the Vessel as of the termination of the applicable
 13 On-Hire Period.” (Id.)

14 The parties’ relevant liability and indemnity obligations were set forth in
 15 paragraphs 8.1 through 8.4 of the 2018 Time Charter Agreement.⁶ Regarding loss or
 16 damage to DMT’s property, including the THELMA, paragraph 8.1 provided as follows:

17 8.1 [DMT] shall defend, protect, indemnify, and hold harmless [AL] from
 18 and against any loss, cost, claim, obligation to indemnify another, suit,
 19 judgment, award, or damage (including reasonable attorneys’ fees),
 20 including, but not limited to, wreck removal, on account of loss or damage
 21 to any of the Vessels, [DMT’s] equipment and vessels, either owned, rented

22 ⁵ The addendum also provided for AL to obtain insurance at a certain amount. (See 2018
 23 Time Charter Agreement at 12.)

24 ⁶ In addition to these four paragraphs, article 8 of the 2018 Time Charter Agreement
 25 included other liability and indemnity obligations that do not affect the court’s disposition of the
 26 instant motions. (See generally 2018 Time Charter Agreement art. 8.)

1 and operated by [DMT] or its agents, subcontractors, and invitees, arising out
 2 of or relating to the performance of the work or services under this Charter,
 3 whether caused or brought about by [AL's] negligence or any other theory
 4 of legal liability, including strict liability or the unseaworthiness of any
 5 vessel.

6 *(Id. ¶ 8.1.)* Similarly, paragraph 8.2 provided that “[DMT] shall defend, protect,
 7 indemnify, and hold harmless [AL]” from any loss, cost, claim or damage “on account of
 8 any illness, injury, or death, suffered by [DMT]’s employees . . . arising out of or relating
 9 to the performance of the work or services under this Charter.” *(Id. ¶ 8.2.)* Regarding
 10 loss or damage to AL’s property, paragraph 8.3 provided as follows:

11 8.3 [AL] shall defend, protect, indemnify and hold harmless [DMT] from and
 12 against any loss, cost, claim, obligation to indemnify another, suit, judgment,
 13 award, or damage (including reasonable attorneys’ fees), on account of loss
 14 or damage to any of [AL’s] equipment and vessels, either owned, rented and
 15 operated by [AL] or its agents, subcontractors, and invitees, arising out of or
 16 relating to the performance of the work or services under this Charter,
 17 whether caused or brought about by [DMT’s] negligence or any other theory
 18 of legal liability, including strict liability or the unseaworthiness of any
 19 vessel.

20 *(Id. ¶ 8.3.)* Similarly, paragraph 8.4 provided that “[AL] shall defend, protect, indemnify,
 21 and hold harmless [DMT]” from any loss, cost, claim or damage “on account of any
 22 illness, injury, or death, suffered by [AL]’s employees . . . arising out of or relating to the
 23 performance of the work or services under this Charter.” *(Id. ¶ 8.4.)* Notwithstanding the
 24 parties’ liability and indemnity obligations, the 2018 Time Charter Agreement stated that
 25 neither party is entitled to recover from the other party any indirect, consequential, or
 26 special damages, including “loss of profits, loss of use, loss of hire, or loss of
 27 production.” *(Id. ¶ 8.9.)*

28 //

1 **B. The 2019 Time Charter Agreement**

2 In May 2019, DMT and AL entered into a second time charter agreement (the
 3 “2019 Time Charter Agreement”) for the charter of the THELMA and three DMT tugs
 4 (collectively, the “vessels”). (See 2019 Time Charter Agreement; *see also* DeForge Decl.
 5 ¶ 8.) The 2019 Time Charter Agreement contained many of the same provisions as the
 6 2018 Time Charter Agreement. For example, it included the same liability and indemnity
 7 provisions (*compare* 2019 Time Charter Agreement ¶¶ 8.1-8.4, *with* 2018 Time Charter
 8 Agreement ¶¶ 8.1-8.4);⁷ additional equipment/alterations and end of charter provisions
 9 (*compare* 2019 Time Charter Agreement ¶ 3.1 & art. 5, *with* 2018 Time Charter
 10 Agreement ¶ 3.1 & art. 5); disclaimer of special, indirect, or consequential damages
 11 (*compare* 2019 Time Charter Agreement ¶ 8.9, *with* 2018 Time Charter Agreement
 12 ¶ 8.9); choice of law provision (*compare* 2019 Time Charter Agreement ¶ 12.4, *with*
 13 2018 Time Charter Agreement ¶ 12.4); and system for determining the condition of the
 14 chartered vessels at the time of “on-hire” and “off-hire” (*compare* 2019 Time Charter
 15 Agreement art. 4, *with* 2018 Time Charter Agreement ¶ 4.1).

16
 17 ⁷ The language in paragraph 8.3 differs slightly between the two Time Charter
 18 Agreements because paragraph 8.3 in the 2019 Time Charter Agreement included this additional
 19 language:

20 8.3 . . . Further, notwithstanding anything to the contrary in Article 8, [AL] shall
 21 additionally defend, protect, indemnify and hold harmless [DMT] from and
 22 against any loss, cost, claim, obligation to indemnify another, suit, judgment,
 23 award, or damage (including reasonable attorneys’ fees), on account of loss or
 24 damage to any Vessel caused by the loading or unloading of any cargo.

25 (2019 Time Charter Agreement ¶ 8.3. *Compare id.*, *with* 2018 Time Charter Agreement
 26 ¶ 8.3.)

1 The 2019 Time Charter Agreement described the vessels to be chartered, the
 2 on-hire and off-hire dates for the vessels, and the price terms. (*See, e.g.*, 2019 Time
 3 Charter Agreement ¶¶ 1.1-1.3.) The agreement maintained the same description of AL
 4 and DMT's respective roles as the 2018 Time Charter Agreement, stating that, "subject to
 5 [AL's] general direction, [DMT] shall have exclusive control and command of each
 6 Vessel's operation and navigation," while AL would be in control of loading and
 7 unloading cargo and similar operations. (*See id.* ¶¶ 1.4, 2.7.)

8 As with the 2018 Time Charter Agreement, the 2019 Time Charter Agreement
 9 imposed specific duties and liabilities on AL related to its handling of the vessels:

10 1.5 [AL] shall direct the Vessels to and between safe ports. [AL] shall be
 11 responsible for any loss or damages sustained by any of the Vessels by reason
 12 of the condition of port or berth.
 13

14 2.7 . . . Notwithstanding the insurance and indemnity provisions of this
 15 Charter, [AL] shall be responsible for loss or damage to the THELMA caused
 16 by the loading or unloading of any cargo performed by [AL's] personnel,
 17 agents, or parties in contract with [AL] without the right to make claim
 18 against [DMT] except in cases of gross negligence or willful misconduct.
 19

20 3.2 [AL] will ensure that there is adequate fendering at all moorage facilities.
 21 Any damage resulting to any of the Vessels arising from [AL's] failure to do
 22 so will be for the sole account of [AL].

23 3.3 Notwithstanding the insurance and indemnity provisions of this Charter,
 24 all deductibles damages, loss, risk, cost, liability, and expense (collectively
 25 'Damages') arising from or related to any grounding of the THELMA,
 26 regardless of fault, shall be for [AL's] account . . .

27 (2019 Time Charter Agreement ¶¶ 1.5, 2.7, 3.2, 3.3 (strikethrough in original).)

1 **C. Alleged Damage to the THELMA During the 2018 and 2019 Charters**

2 The parties agreed to use marine surveyor Mark McElwaine to conduct the 2018
 3 and 2019 on- and off-hire surveys of the THELMA, as provided for in the Time Charter
 4 Agreements. (See DeForge Decl. ¶¶ 6-7, 9-10, Exs. 2-3, 5-6; *see also* 2018 Time Charter
 5 Agreement ¶ 4.1; 2019 Time Charter Agreement art. 4.) When Mr. McElwaine
 6 performed the 2018 and 2019 on-hire surveys, he noted that the THELMA had extensive
 7 preexisting damage to certain structures. (See DeForge Decl., Exs. 2, 5.) Despite the
 8 preexisting damage to the THELMA, Mr. McElwaine's 2018 and 2019 off-hire surveys
 9 identified several areas of "new" damage that the THELMA allegedly sustained during
 10 the respective charter periods.⁸ (See *id.*, Exs. 3, 6.) His off-hire surveys, however, did
 11 not identify the cause(s) of the "new" damage. (*See generally id.*)

12 Because the parties disputed who was liable for the alleged 2018 and 2019 damage
 13 to the THELMA under the terms of the Time Charter Agreements (*see generally* Am.
 14 Compl.; Pls. MSJ at 7; Defs. MSJ at 12), DMT commenced this action in July 2020,
 15 asserting claims for breach of contract, account stated, and negligence against Defendants
 16 (*see generally* Compl. (Dkt. # 1); Am. Compl. (adding Double EMC as a Plaintiff)). In
 17 its negligence claim and a portion of its breach of contract claim,⁹ DMT seeks to recover
 18

19 ⁸ Defendants dispute the reliability of Mr. McElwaine's findings, but do not dispute, for
 20 the purposes of these motions, that the "items identified on the off-hire surveys were 'new
 21 damage.'" (See Defs. MSJ at 7 n.5, 18; Defs. Resp. at 1 n.1.)

22 ⁹ In its breach of contract claim, DMT also requests a monetary sum, seemingly unrelated
 23 to the costs associated with the barge damage, for the "principal, interest and late fees" owed on
 24 two unpaid invoices for services that DMT provided under the Time Charter Agreements and for
 25 reimbursement of expenses for such services. (See Am. Compl. at 2-5.)

1 a monetary sum for the damage that the THELMA sustained during the charter periods.
 2 (See Am. Compl. at 3-5.) In calculating the sum owed for the damage, DMT included the
 3 costs of repairs and daily charter hire for the days required to repair the THELMA. (See
 4 *id.*; Edwards Decl. (Dkt. # 36) ¶¶ 13-14 (describing the costs DMT is claiming for
 5 damage to the THELMA and charter hire); Park Decl. ¶ 11, Ex. J (setting forth DMT's
 6 barge damage calculations).)

7 III. ANALYSIS

8 Defendants move for partial summary judgment in their favor on DMT's barge
 9 damage claims, which they characterize as DMT's claims for negligence and/or breach of
 10 contract insofar as the claims request relief related to the damage to the THELMA. (See
 11 Defs. MSJ at 2, 13, 17.) They ask the court to dismiss the barge damage claims in their
 12 entirety or, alternatively, dismiss the portions of them in which DMT seeks to recover
 13 charter hire. (See *id.*) Defendants also ask the court to dismiss the claims asserted
 14 against them by Double EMC because it is not a proper party to this dispute. (See *id.* at
 15 18-19.) DMT opposes Defendants' motion (*see generally* Pls. Resp.) and cross-moves
 16 for partial summary judgment in its own favor on its barge damage claims with respect to
 17 the issue of liability for the damage to the THELMA. (See Pls. MSJ at 1-2, 7-12.)
 18 Below, the court sets out the relevant legal standards before turning to consider the
 19 parties' arguments in favor of their respective motions for partial summary judgment.

20 //

21 //

22 //

1 **A. Legal Standards**

2 The court sets out the standard of review that applies to its consideration of
3 cross-motions for summary judgment before discussing the legal standards governing the
4 interpretation of maritime contracts.

5 1. Summary Judgment

6 Summary judgment is appropriate if the evidence viewed in the light most
7 favorable to the non-moving party shows “that there is no genuine dispute as to any
8 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
9 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is “material” if it
10 might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
11 (1986). A factual dispute is “genuine” only if there is sufficient evidence for a
12 reasonable fact finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*,
13 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

14 The moving party bears the initial burden of showing there is no genuine dispute
15 of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at
16 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can
17 show the absence of such a dispute in two ways: (1) by producing evidence negating an
18 essential element of the nonmoving party’s case, or (2) by showing that the nonmoving
19 party lacks evidence of an essential element of its claim or defense. *Nissan Fire &*
20 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party
21 meets its burden of production, the burden then shifts to the nonmoving party to identify
22 specific facts from which a factfinder could reasonably find in the nonmoving party’s

1 favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250. Where cross motions are at
 2 issue, the court must “evaluate each motion separately, giving the nonmoving party in
 3 each instance the benefit of all reasonable inferences.” *ACLU of Nev. v. City of Las*
 4 *Vegas*, 466 F.3d 784, 790-91 (9th Cir. 2006); *Tulalip Tribes of Wash. v. Washington*, 783
 5 F.3d 1151, 1156 (9th Cir. 2015) (“[W]hen simultaneous cross-motions for summary
 6 judgment on the same claim are before the court, the court must consider the appropriate
 7 evidentiary material identified and submitted in support of both motions, and in
 8 opposition to both motions, before ruling on each of them.” (quoting *Fair Hous. Council*
 9 *of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001))).

10 2. Interpretation of Maritime Contracts

11 A contract that relates to a ship, to commerce or navigation on navigable waters,
 12 or to maritime employment is a maritime contract. *Brusco Tug & Barge, Inc. v. St. Paul*
 13 *Fire & Marine Ins. Co.*, 897 F. Supp. 2d 1048, 1052 (W.D. Wash. 2012) (citing
 14 *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1080 (2d Cir.
 15 1993)). The Time Charter Agreements qualify as maritime contracts because they relate
 16 to ships and navigation on navigable waters. *See Aqua-Marine Constructors, Inc. v.*
 17 *Banks*, 110 F.3d 663, 671 (9th Cir. 1997) (“A charter party is clearly a maritime
 18 contract.”).

19 Courts “interpret and resolve disputes concerning maritime contracts according to
 20 federal law.” *Heko Servs., Inc. v. ChemTrack Alaska, Inc.*, 418 F. Supp. 3d 656, 660
 21 (W.D. Wash. 2019) (first citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2004); and
 22 then citing *Starrag v. Maersk, Inc.*, 486 F.3d 607, 616 (9th Cir. 2007)). Courts, however,

1 may use state law to interpret maritime contracts, provided that it does not clearly conflict
 2 with federal maritime law. *Aqua-Marine Constructors*, 110 F.3d at 667-68 (citing
 3 *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)). “Basic principles in
 4 the common law of contracts readily apply in the maritime context.” *Clevo Co. v. Hecny*
 5 *Transp., Inc.*, 715 F.3d 1189, 1194 (9th Cir. 2013) (noting that the Ninth Circuit looks to
 6 the Restatement (Second) of Contracts to determine the basic elements of contract law);
 7 *see also CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1087-88
 8 (2020) (“Maritime contracts must be construed like any other contracts: by their terms
 9 and consistent with the intent of the parties.”).

10 Under federal maritime law, “[c]ontract terms are to be given their ordinary
 11 meaning, and whenever possible, the plain language of the contract should be considered
 12 first.” *Anderson v. City of Seward*, 475 F. Supp. 3d 986, 991 (D. Alaska 2020) (quoting
 13 *Starrag*, 486 F.3d at 616); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1214, 1217
 14 (5th Cir. 1986) (noting that courts should read maritime contracts as a whole and look
 15 first to the intent of the parties as expressed by the terms of the agreement). “Only if the
 16 language is ambiguous—reasonably susceptible to more than one interpretation—should
 17 a court examine extrinsic evidence and look beyond the written language of the contract”
 18 to determine the intent of the parties. *Anderson*, 475 F. Supp. 3d at 991 (citing *Fontenot*,
 19 791 F.2d at 1214); *see also In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 859
 20 (8th Cir. 2010) (“Disagreement as to the meaning of a maritime contract does not make it
 21 ambiguous, nor does uncertainty or lack of clarity in the language chosen by the parties.”)
 22 (quoting *Breaux v. Halliburton Energy Servs.*, 562 F.3d 358, 364 (5th Cir. 2009))). The

1 introduction of extrinsic evidence, however, injects a fact issue concerning the parties’
 2 intent that generally precludes summary judgment. *Teras Chartering, LLC v. Hyupjin*
 3 *Shipping Co.*, No. C16-0188RSM, 2017 WL 2363632, at *7 (W.D. Wash. May 31, 2017)
 4 (citing *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288, 294 (5th Cir. 2007)). “When
 5 the district court’s decision is based on analysis of the contractual language and an
 6 application of the principles of contract interpretation, that decision is a matter of law.”
 7 *W. Towboat Co. v. Vigor Marine, LLC*, 544 F. Supp. 3d 1100, 1116 (W.D. Wash. 2021)
 8 (quoting *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985)); *see also*
 9 *Breaux*, 562 F.3d at 364.

10 **B. Defendants’ Liability for DMT’s Barge Damage Claims**

11 Defendants ask the court to dismiss DMT’s barge damage claims—i.e., its claims
 12 for breach of contract and/or negligence—because, they assert, they are not liable for
 13 such damage in light of DMT’s “lack [of] evidence that the alleged damage [to the
 14 THELMA] occurred as a result of a specifically delineated exception” to the Time
 15 Charter Agreements’ indemnity clauses. (*See* Defs. MSJ at 13-17.) DMT cross-moves
 16 for partial summary judgment on these claims, arguing that AL is liable under the Time
 17 Charter Agreements for the damage that the THELMA sustained during the 2018 and
 18 2019 charter periods. (*See* Pls. MSJ at 7-12 (noting that its motion solely focuses on
 19 liability and does not address the parties’ disputes regarding “the extent and severity of
 20 those damages and the reasonable costs to repair”)). The court considers the parties’
 21 arguments regarding the proper interpretation of the Agreements with respect to AL’s

22 //

1 liability for damage to the chartered vessels before turning to Defendants' arguments
 2 regarding DMT's lack of evidence as to the cause of the damage to the THELMA.

3 1. Interpretation of the Time Charter Agreements

4 The parties agree that the Time Charter Agreements imposed liability on AL for
 5 barge damage resulting from grounding, inadequate fendering, unsafe berth, or
 6 loading/unloading. (See Pls. MSJ at 9-10; Defs. MSJ at 15.) The parties' disagreement,
 7 however, revolves around whether the Agreements imposed liability on AL for barge
 8 damage caused *only* by those specific events, or whether AL is strictly liable for *any*
 9 damage that the THELMA sustained during the charter periods. (See Defs. Reply at 2-6;
 10 Pls. Reply at 2-4.) Both parties maintain that the Time Charter Agreements' language is
 11 unambiguous and can be interpreted in their favor on summary judgment without
 12 considering extrinsic evidence. (See Pls. Reply at 7; Defs. Reply at 6.)

13 DMT argues that the Time Charter Agreements required AL to "restore the
 14 chartered vessels to their pre-hire condition" and "imposed responsibility on AL" for any
 15 damage to the vessels during the charter periods beyond ordinary wear and tear. (See Pls.
 16 MSJ at 9-10.) Its interpretation relies on the Agreements' additional
 17 equipment/alterations and end of charter provisions, which provided that: AL shall
 18 "remove[] all such equipment, materials and gear, and restore[] each Vessel to its
 19 condition prior to making such changes, ordinary wear and tear excepted" (2018 Time
 20 Charter Agreement ¶ 3.1; 2019 Time Charter Agreement ¶ 3.1); and "[t]he Vessels shall
 21 be redelivered to [DMT] . . . in the same order and condition, ordinary wear and tear
 22 excepted, as when accepted by [AL]" (2018 Time Charter Agreement art. 5; 2019 Time

1 Charter Agreement art. 5). DMT contends that its interpretation of those clauses as
 2 imposing strict liability on AL for any damage to the chartered vessels is “is reinforced
 3 by the clauses requiring on-hire and off-hire surveys to ‘conclusively’ document the
 4 THELMA’s condition at the start and end of the hire periods.” (See Pls. Reply at 2 (first
 5 citing 2018 Time Charter Agreement ¶ 4.1; and then citing 2019 Time Charter
 6 Agreement art. 4).) It attempts to discount the indemnity clause contained in paragraph
 7 8.1 of the Agreements, the plain text of which requires DMT to indemnify AL for
 8 damage to the chartered vessels, by arguing that the clause: (1) is merely a “general
 9 provision about liability and a duty to indemnify/defend”; (2) “is clearly intended to
 10 address third party suits, casualties, and related claims or costs rather than the parties’
 11 liability to each other for damage caused”; and (3) “does not purport to immunize AL
 12 from liability even when AL causes damage to the hired vessels during its charter.” (See
 13 Pls. MSJ at 9-10; Pls. Resp. at 6.)

14 In contrast, Defendants characterize paragraphs 8.1-8.4 of the Time Charter
 15 Agreements as containing “clear and unambiguous knock for knock indemnity clauses”
 16 because they “require each party to contractually assume responsibility for injuries to its
 17 own employees and damage to its own property, without regard to who caused the injury
 18 or how such damage occurred.” (See Defs. MSJ at 14-15 (citing Daniel B. Shilliday et
 19 al., *Contractual Risk-Shifting in Offshore Energy Operations*, 81 Tul. L. Rev. 1579, 1599
 20 (2007)).) They also contend that the Time Charter Agreements contain several express
 21 exceptions to knock for knock indemnity under which AL could only “be liable for barge
 22 damage resulting from specific causes” such as grounding, loading/unloading, inadequate

1 fendering, or unsafe berth. (*See id.*) Moreover, Defendants claim that the Agreements
 2 cannot be interpreted as imposing strict liability on AL for any damage to the THELMA
 3 because such an interpretation is not supported by the Agreements' language and would
 4 render the indemnification clauses, and the specific exceptions to those clauses,
 5 meaningless. (*See* Defs. Resp. at 5-8; Defs. Reply at 5-6.)

6 The court agrees that the terms of the Time Charter Agreements are not
 7 ambiguous and concludes that Defendants' interpretation of AL's obligations under the
 8 Agreements in relation to vessel damage is the only reasonable interpretation. Starting
 9 with the Agreements' liability and indemnity provisions, the court notes that federal
 10 maritime law requires it to construe indemnity clauses "to cover all losses, damages, or
 11 liabilities which reasonably appear to have been within the contemplation of the parties,"
 12 but not those "which are neither expressly within its terms nor of such a character that it
 13 can be reasonably inferred that the parties intended to include them within the indemnity
 14 coverage." *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981).

15 Paragraph 8.1 of the Time Charter Agreements provided that "[DMT] shall
 16 defend, protect, indemnify, and hold harmless [AL] from and against any loss, cost,
 17 claim, obligation to indemnify another, suit, judgment, award, or damage . . . on account
 18 of loss or damage to any of the Vessels, [DMT's] equipment and vessels . . . whether
 19 caused or brought about by [AL's] negligence or any other theory of legal liability." (*See*
 20 2018 Time Charter Agreement ¶ 8.1; 2019 Time Charter Agreement ¶ 8.1.) Similarly,
 21 paragraph 8.3 provided that "[AL] shall defend, protect, indemnify and hold harmless
 22 [DMT] from and against any loss, cost, claim, obligation to indemnify another, suit,

1 judgment, award, or damage . . . on account of loss or damage to any of [AL's]
 2 equipment and vessels . . . whether caused or brought about by [DMT's] negligence or
 3 any other theory of legal liability." (*See* 2018 Time Charter Agreement ¶ 8.3; 2019 Time
 4 Charter Agreement ¶ 8.3.) The plain language of these provisions supports Defendants'
 5 interpretation of the Time Charter Agreements' indemnity clauses as establishing knock
 6 for knock indemnity (*see* Defs. MSJ at 14; Defs. Reply at 2-3), meaning that each party is
 7 responsible for claims arising out of or relating to its own property such that DMT is
 8 barred from recouping costs from AL related to barge damage unless the damage arises
 9 from an exception to the knock for knock indemnity clauses. *See, e.g., W. Towboat Co.*,
 10 544 F. Supp. 3d at 1120-21 (describing the indemnity clauses in the parties' agreement as
 11 knock for knock indemnity clauses and discussing their scope); *Heko Servs.*, 418 F. Supp.
 12 3d at 659, 664 (discussing the parties reciprocal indemnification clauses in which
 13 plaintiff "agreed to be responsible for all loss, damage, expense, liability or claims
 14 applicable to the barge, even if resulting from the negligence of [the defendant], and [the
 15 defendant] agreed to the same with respect to its cargo").

16 To adopt DMT's interpretation and conclude that the indemnity clause in
 17 paragraph 8.1, which addresses damage to DMT's property, only applied to "third party
 18 suits . . . rather than the parties' liability to each other for damage caused" (*see* Pls. Resp.
 19 at 6) would require the court to ignore the clause's broad application to "any loss, cost,
 20 claim, obligation to indemnify another, suit, judgment, award, or damage" (*see, e.g.,*
 21 2018 Time Charter Agreement ¶ 8.1; 2019 Time Charter Agreement ¶ 8.1). Further, it
 22 would be unreasonable to read paragraph 8.1 as not requiring DMT to indemnify AL

1 “from and against” claims of damage to the THELMA, even when the damage is caused
 2 by AL, when the clause explicitly provided that DMT would indemnify AL “on account
 3 of loss or damage to any of the Vessels, [DMT’s] equipment and vessels . . . whether
 4 caused or brought about by [AL’s] negligence or any other theory of legal liability.” (See
 5 2018 Time Charter Agreement ¶ 8.1; 2019 Time Charter Agreement ¶ 8.1.) However,
 6 the court’s analysis does not end here.

7 As discussed above, the Time Charter Agreements unambiguously described four
 8 circumstances under which AL could be liable for damage to the THELMA, including
 9 damage resulting from grounding, inadequate fendering, unsafe berth, or
 10 loading/unloading. (See 2018 Time Charter Agreement ¶¶ 2.7, 2.9 & Addendum ¶¶ 1-2;
 11 2019 Time Charter Agreement ¶¶ 1.5, 2.7, 3.2-3.3.) “Well-founded principles of contract
 12 law establish that ‘specific terms and exact terms are given greater weight than general
 13 language’ and that ‘separately negotiated or added terms are given greater weight than
 14 standardized terms’” *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*,
 15 525 F.3d 409, 420 (6th Cir. 2008) (quoting Restatement (Second) of Contracts § 203
 16 (1981)). Applying this principle and construing the Agreements’ indemnity clauses “to
 17 cover all losses, damages, or liabilities which reasonably appear to have been within the
 18 contemplation of the parties,” the court concludes that the only reasonable interpretation
 19 of the Agreements is that the parties intended for those four specific circumstances to be
 20 exceptions to DMT’s agreement to indemnify AL for any loss or damage to the chartered
 21 vessels. (Compare 2018 Time Charter Agreement 8.1, and 2019 Time Charter
 22 //

1 Agreement 8.1, with 2018 Time Charter Agreement ¶¶ 2.7, 2.9 & Addendum ¶¶ 1-2, and
 2 2019 Time Charter Agreement ¶¶ 1.5, 2.7, 3.2-3.3.)

3 This conclusion holds true notwithstanding DMT's proffered interpretation of the
 4 Time Charter Agreements' additional equipment/alterations and end of charter clauses as
 5 imposing strict liability on AL for any damage to the vessels beyond ordinary wear and
 6 tear. Addressing the end of the charter period, the Agreements' additional
 7 equipment/alterations and end of charter clauses provided as follows:

8 3.1 [AL] may . . . load and install any equipment, materials and gear and
 9 make alterations and additions to each Vessel incident to the service in which
 10 it is to be used . . . The On-Hire Period for each Vessel shall not end until
 11 [AL], at its sole cost and expense, removes all such equipment, materials and
 12 gear, and restores each Vessel to its condition prior to making such changes,
 13 ordinary wear and tear excepted.¹⁰

14 . . .
 15 Article 5 . . . The Vessels shall be redelivered to [DMT] upon termination of
 16 the On-Hire Periods applicable thereto at [DMT's] home port in Seattle,
 17 Washington, or other such other location as agreed between the parties, in
 18 the same order and condition, ordinary wear and tear excepted, as when
 19 accepted by [AL] . . .

20 (2018 Time Charter Agreement ¶ 3.1 & art. 5; 2019 Time Charter Agreement ¶ 3.1 & art.
 21 5.)

22 The court concludes that DMT's proposed interpretation of the terms "same order
 23 and good condition" and "restore[] each Vessel" as imposing strict liability on AL for any
 24 damage to the vessels beyond ordinary wear and tear is unreasonable for a number of

¹⁰ While DMT's arguments mainly rely on the term "same order and condition" in article 5 and do not substantially address the "restore" language in paragraph 3.1, the court will address the language in both provisions together. (See Pls. MSJ at 9-10; Pls. Reply at 2.)

1 reasons. (See Pls. MSJ at 9-10; Pls. Reply at 2-4.) First, DMT's interpretation would
 2 render meaningless paragraph 8.1 and the specific exceptions making AL responsible for
 3 damages caused by inadequate fendering, unsafe berth, loading/unloading, or grounding
 4 because if AL was strictly liable for any damage to the vessels, paragraph 8.1 would have
 5 no effect and there would be no reason to carve out exceptions to the knock-for-knock
 6 indemnity clauses. "A basic principle of contract interpretation in admiralty law is to
 7 interpret, to the extent possible, all the terms in a contract without rendering any of them
 8 meaningless or superfluous." *Starrag*, 486 F.3d at 616 (quoting *Chembulk Trading LLC*
 9 v. *Chemex Ltd.*, 393 F.3d 550, 555 (5th Cir. 2004)). DMT tries to explain why its
 10 interpretation would not render the clauses relating to loading/unloading, grounding,
 11 fendering, and safe berth meaningless, arguing that those clauses address the "proper
 12 agreed treatment of the vessels" while paragraph 3.1 and article 5 address "AL's
 13 responsibly for safe return at the end of the charter period." (See Pls. Reply at 4.) The
 14 court disagrees. Consider, for example, paragraph 2.7 of the 2018 Time Charter
 15 Agreement, which provided that "[AL] shall not at any time ground the THELMA. Any
 16 damage to the THELMA caused by grounding while in the sole control of [AL] will be at
 17 the sole expense of and for the sole account of [AL]." If the parties had intended AL to
 18 be strictly liable for any damage to the vessels but wanted to also address the "proper
 19 agreed treatment of the vessels" (Pls. Reply at 4), paragraph 2.7 could have simply read
 20 "[AL] shall not at any time ground the THELMA."

21 Second, it would be unreasonable to interpret those terms as imposing strict
 22 liability within the context of the entire clauses in which they appear. See *F.W.F., Inc. v.*

1 | *Detroit Diesel Corp.*, 494 F. Supp. 2d 1342, 1358 (S.D. Fla. 2007), *aff'd*, 308 F. App'x
 2 | 389 (11th Cir. 2009) ("[T]he meaning of an unclear word or phrase should be determined
 3 | by the words immediately surrounding it."). The language in paragraph 3.1 of the
 4 | Agreements regarding restoration of the vessels clearly relates to AL's obligation to
 5 | return the vessels to their initial configuration and condition at the end of the charter
 6 | period by removing any modifications and installed equipment, materials, and gear; it
 7 | does not mention any obligation for AL to repair any damage that the vessels sustained
 8 | during the charter period.¹¹ (*See* 2018 Time Charter Agreement ¶ 3.1; 2019 Time Charter
 9 | Agreement ¶ 3.1.) The "same order and condition" clause in article 5 relates to how the
 10 | parties would determine the end of the charter period. (*See* 2018 Time Charter
 11 | Agreement art. 5; 2019 Time Charter Agreement art. 5.)

12 Third, DMT's interpretation would lead to an absurd result because it would hold
 13 AL responsible for damage to the THELMA, even if DMT, who retained "exclusive
 14 control and command" of the vessels' operation and navigation (*see* 2018 Time Charter
 15 Agreement ¶ 1.1; 2019 Time Charter Agreement ¶ 1.4), intentionally caused the damage.
 16 *See In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d at 861-62 (stating that "maritime
 17 law provides that construction of a maritime contract should not "lead [] to . . . absurd
 18 consequences" (quoting *Chembulk Trading*, 393 F.3d at 555 n.6)). Finally, as noted by
 19 Defendants, courts have only treated language like "same condition" or "good condition"

21 ¹¹ The parties agree that this case does not involve damages relating to modifications or
 22 installed equipment. (*See generally* Defs. Reply at 7 (stating the same); Pls. MSJ (lacking any
 allegations that its claims relate to modifications or installed equipment); Pls. Reply (same).)

1 as imposing strict liability on the charterer for any damage to the vessel when the charter
2 agreements also contained additional language making that obligation clear. For
3 example, courts have imposed strict liability where the charter agreements provided that:
4 the charterer “shall be solely responsible for all loss, damage, liability . . . of any type or
5 nature whatsoever and howsoever caused arising out of or related to the [Barge] and/or its
6 use or operation during the charter term or otherwise as a result of this agreement,”
7 *Channel Constr., Inc. v. Northland Servs., Inc.*, No. C14-1231JCC, 2015 WL 9259845, at
8 *2 (W.D. Wash. Dec. 18, 2015); the charterer “assumes all risk of loss of and damage to
9 the vessel from any cause,” *KAI Enters., L.L.C. v. Boh Bros. Constr. Co., L.L.C.*, 731 F.
10 Supp. 2d 568, 576 (E.D. La. 2010); and the charterer “shall be liable and responsible for
11 any and all loss and damage” to the vessel, *Sun Printing & Publ'g Ass'n v. Moore*, 183
12 U.S. 642, 655 (1902). The Agreements here lack such language. (See generally 2018
13 Time Charter Agreement; 2019 Time Charter Agreement.) Thus, the court is unable to
14 conclude that the Agreements’ “same order and condition” or “restore[] each Vessel”
15 language can be reasonably interpreted as imposing strict liability on AL for any damage
16 to the chartered vessels.

17 While DMT also relies on the Agreements’ system for determining the condition
18 of the vessels before and after the charter period (*see* 2019 Time Charter Agreement art.
19 4, *with* 2018 Time Charter Agreement ¶ 4.1) to support its strict liability interpretation
20 (*see* Pls. MSJ at 9; Pls. Reply at 2), that system does not alter the court’s interpretation of
21 the Agreements. Rather, the on- and off-hire survey system is relevant to the
22 determinations of whether the vessels were damaged in a manner that imposes liability on

1 AL under the four exceptions to the knock for knock indemnity clauses, and whether AL
2 properly removed all additional equipment and restored the vessels to their pre-alteration
3 condition.

4 Accordingly, reading each provision of the Time Charter Agreements in light of
5 all others so as to give meaning to each clause, the court concludes that the Agreements
6 unambiguously provided for knock for knock indemnification regarding damage to each
7 party's property, aside from the four specifically delineated exceptions set forth therein,
8 and did not impose strict liability upon AL for damage to the vessels.

9 2. DMT's Evidence Regarding the Cause of the Damage to the THELMA

10 Having adopted Defendants' interpretation of the Time Charter Agreements'
11 liability and indemnity provisions, the court turns to Defendants' contention that the court
12 should dismiss Plaintiffs' barge damage claims in their entirety. Defendants argue that
13 dismissal is appropriate because DMT lacks evidence that the damage to the THELMA
14 was caused by one of the exceptions to the Time Charter Agreements' indemnity clauses.
15 (Defs. MSJ at 15-17.) To establish that there is no genuine dispute of material fact that
16 the damage to the THELMA was not caused by inadequate fendering, unsafe berth,
17 loading/unloading, or grounding, they cite to DMT's interrogatory response and the
18 deposition of Eric Edwards, DMT's Federal Rule of Civil Procedure 30(b)(6) designee.
19 (*Id.*) During his deposition, Mr. Edwards speculated about the cause of the damage to the
20 THELMA, but stated that he "do[es] not" know what actually caused the damage that the
21 THELMA sustained during the 2018 or 2019 charter periods. (*See* Edwards Dep. at
22 37:11-38:4, 38:10-12, 45:3-15; *see also id.* at 38:7-8, 38:13-19 (stating that his

1 “speculation” as to the cause of the damage is “lack of safe berth”.) Similarly, DMT’s
 2 interrogatory response provided that it was “unaware of what specific acts or omissions
 3 of AL might have caused the damage to the THELMA during the charter hire periods,
 4 though the damage appears to have been sustained while the vessel was berthed or
 5 docked.” (*See id.* ¶ 9, Ex. H (“DMT Rog. No. 8 Resp.”).) Defendants also rely on the
 6 lack of expert testimony regarding the cause of the damage, noting that DMT has not
 7 retained an expert witness and that its failure to do so means that it cannot carry its
 8 burden to establish causation in this case. (*See* Defs. MSJ at 17; Defs. Reply at 4-5.)

9 In response, DMT argues that the issue of causation is irrelevant to the question of
 10 liability for barge damage under the Time Charter Agreements because Defendants are
 11 strictly liable for any damage that the THELMA sustained during the time charter
 12 periods. (*See* Pls. Resp. at 3-4.) It also cites the declaration of Mr. Daniel DeForge, the
 13 manager of DMT (*see* DeForge Decl. ¶ 2), in which Mr. DeForge states that AL
 14 grounded the THELMA during the charter periods. (*See id.* at 2 (citing DeForge Decl.
 15 ¶ 4).) Further, DMT submitted a declaration from Mr. Edwards in support of its
 16 response, in which he addressed the cause of the damage to the THELMA as follows:

17 Based on my knowledge of the THELMA, and of tug and barge operations
 18 generally, the damage sustained during the AL charters was of a type that
 19 would be sustained while in port or during loading/unloading. Specifically,
 20 the crushing of the side shell and internal framing can only be sustained while
 21 the vessel is against or impacts another large and heavy object, and the
 22 damage to the bottom is consistent with grounding of the vessel.

(Edwards Decl. ¶ 12.) Defendants characterize Mr. Edward’s declaration as a “sham
 declaration” because he already testified during his Rule 30(b)(6) deposition “that DMT

1 did not know how or when the damage occurred.” (See Defs. Reply at 4 (citing *Kennedy*
 2 *v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)).)

3 In a maritime action for negligence or breach of contract, “the plaintiff must prove
 4 that the defendant caused the resulting harm by a preponderance of the evidence.” *Mullin*
 5 *v. Bayline, Inc.*, No. CV 19-11028-MBB, 2021 WL 5817922, at *4-5 (D. Mass. Dec. 7,
 6 2021) (citing *Pariseau v. Capt. John Boats, Inc.*, No. CIV.A. 09-10624-JGD, 2012 WL
 7 527652, at *14 (D. Mass. Feb. 16, 2012)). Here, to hold Defendants liable for the
 8 damage to the THELMA under its negligence and breach of contract claims, DMT must
 9 establish not only that AL caused the damage to the THELMA but also that the damage
 10 was caused by one of the exceptions to the Time Charter Agreements’ indemnity clauses.

11 *See id.; supra* Section III.B.1.

12 As the moving party, Defendants met their burden to show that there is no genuine
 13 dispute of material fact and that they entitled to prevail as a matter of law on DMT’s
 14 barge damage claims by pointing to DMT’s lack of evidence regarding an essential
 15 element of those claims—namely, the cause of the damage. (See Defs. MSJ at 15-17;
 16 Defs. Reply at 3-5); *see also Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1106. DMT,
 17 however, failed to carry its burden to produce evidence or identify specific facts that
 18 would establish a genuine dispute of material fact regarding the cause of the damage to
 19 the THELMA. *See Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250. The statements
 20 in the record make clear that DMT does not know the actual cause of the damage to the
 21 THELMA (*see, e.g.*, DMT Rog. No. 8 Resp.; Edwards Dep. at 37:11-38:4, 45:3-15), nor

22 //

1 have they offered any expert testimony or competent evidence to establish causation.¹²
 2 DMT's reliance on Mr. DeForge's declaration for the proposition that the THELMA was
 3 grounded during the charter periods is misplaced because that declaration does not offer
 4 any evidence to support that allegation, nor does it attribute any of the damage identified
 5 on the off-hire surveys to grounding. (*See generally* DeForge Decl. ¶ 4.) Moreover, to
 6 the extent that Mr. Edwards's declaration can be read as offering more than speculation
 7 regarding the cause of the damage to the THELMA, it is inconsistent with his deposition
 8 testimony in which he stated that he did not know the cause of the damage and conceded
 9 that he could only "speculate as what it was." (*Compare* Edwards Decl. ¶ 12, *with*
 10 Edwards Dep. at 37:11-38:19, 45:3-15.) These declarations are insufficient to create a
 11 triable issue of fact. *See Kennedy*, 952 F.2d at 266 ("The general rule in the Ninth Circuit
 12 is that a party cannot create an issue of fact by an affidavit contradicting his prior
 13 deposition testimony."); *see also Nelson v. Pima Cnty. Coll.*, 83 F.3d 1075, 1081-82 (9th
 14 Cir. 1996) ("[M]ere allegation and speculation do not create a factual dispute for
 15 purposes of summary judgment."); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984
 16 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving papers is
 17 insufficient to raise genuine issues of fact and defeat summary judgment."); *Villiarimo v.*
 18 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (explaining that
 19 //

21 ¹² Because DMT has failed to produce any competent evidence regarding the cause of the
 22 THELMA's damage, the court will not address the issue of whether DMT is required to produce
 expert testimony in order to establish that the damage to the THELMA was caused by inadequate
 fendering, unsafe berth, loading/unloading, or grounding.

1 “uncorroborated and self-serving” testimony without other evidence may not create a
 2 genuine issue of material fact).

3 Because DMT failed to introduce sufficient evidence to raise a material dispute of
 4 fact as to whether the damage to the THELMA was caused by inadequate fendering,
 5 unsafe berth, loading/unloading, or grounding, the court concludes that dismissal of
 6 DMT’s barge damage claims in their entirety is appropriate. *See Celotex*, 477 U.S. at 322
 7 (“[A] complete failure of proof concerning an essential element of the nonmoving party’s
 8 case necessarily renders all other facts immaterial.”). In sum, the court DENIES DMT’s
 9 motion for partial summary judgment and GRANTS the portion of Defendants’ motion
 10 for partial summary judgment that requests dismissal of DMT’s barge damage claims in
 11 their entirety.

12 **C. The Portions of DMT’s Barge Damage Claims in Which DMT Seeks to
 13 Recover Charter Hire**

14 Alternatively, Defendants’ motion asks the court to dismiss the portions of DMT’s
 15 barge damage claims in which DMT seeks to recover charter hire for the time it took to
 16 repair the damage that the THELMA suffered during the charter periods because charter
 17 hire “is not recoverable” under the Time Charter Agreements. (*See* Defs. MSJ at 18-19;
 18 Def. Reply at 6-8.) Because the court has granted the portion of Defendants’ motion
 19 that requests dismissal of DMT’s barge claims in their entirety, *see supra* Section III.B,
 20 the court finds it unnecessary to address Defendants’ alternative argument.

21 //

22 //

1 **D. Dismissal of Double EMC's Claims**

2 The final portion of Defendants' motion asks the court to dismiss the claims
3 asserted by Double EMC. (*See* Defs. MSJ at 18-19.) Defendants contend that "Double
4 EMC is not a proper party to this lawsuit because it was not a party to the contracts and
5 has no standing to claim damages relating to the THELMA as the vessel had been
6 bareboat chartered to DeForge at the times relevant to this dispute." (*See id.* at 19.) The
7 court agrees with DMT's contention that this issue is moot because the parties stipulated
8 to the dismissal of Double EMC from this action after Defendants filed their motion.
9 (*See* Stip.; 2/12/22 Order; *see also* Pls. Resp. at 12 (discussing why this issue is moot).)
10 Defendants do not dispute that this aspect of their motion is moot. (*See generally* Defs.
11 Reply.) Accordingly, the court DENIES as moot the portion of Defendants' motion that
12 requests dismissal of the claims asserted against them by Double EMC.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the court DENIES DMT's motion for partial summary
15 judgment (Dkt. # 30) and GRANTS in part and DENIES in part Defendants' motion for
16 partial summary judgment (Dkt. # 27). Specifically, the court GRANTS Defendants'
17 request that the court dismiss DMT's barge damage claims and DENIES as moot
18 Defendants' request that the court dismiss the claims asserted by Double EMC.

19 //

20 //

21 //

22 //

1 Dated this 7th day of March, 2022.

2
3
4



5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

JAMES L. ROBART
United States District Judge